

CALIFORNIA COASTAL COMMISSION

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Submitted 2/23/01
Staff: PE-LB
Staff Report: 3/22/01
Hearing Date: 4/10/01
Commission Action:

STAFF REPORT: REVOCATION REQUEST**APPLICATION NUMBER:** 5-91-463A2**APPLICANT:** Playa Capital LLC**AGENTS:** Catherine Tyrrell, David Vena, Wayne Smith**PROJECT LOCATION:** Ballona Wetlands, City and County of Los Angeles, also described as Playa Vista Areas A, B, and C, Lincoln and Jefferson Boulevards, City and County of Los Angeles, APN 4211-14-13, 7, 8, & 9**PROJECT DESCRIPTION (APPROVED SEPTEMBER 13, 1991)** (1) Develop a 26.1 acre freshwater marsh restoration project; (2) to have Coastal Commission accept proposed freshwater marsh restoration and proposed riparian corridor restoration (which is outside of the coastal zone) as mitigation for future development proposals in other areas of Ballona Wetlands; and (3) adoption of recent (1991) delineation of wetland habitat in Area A of Ballona wetlands.**DESCRIPTION OF AMENDMENT APPROVED APRIL 8, 1992:** Amendment A2: (1) Request to delete Condition D, definition for successful completion of the wetland restoration project, and replace with Condition C2, including new language requiring establishment of freshwater wetland system, one year of monitoring and additional assurances for long term management before release of mitigation credits; (2) change the expiration date from two years of approval of the permit to two years after issuance of the permit; (3) other minor modifications to the permit conditions.**PERSON REQUESTING REVOCATION:** Marcia Hanscom, Wetlands Action Network**SUMMARY OF STAFF RECOMMENDATION**

Staff recommends that the Commission deny the request for revocation on the basis that no grounds exist for revocation under Section 13105(a), and there is a question whether the request was filed with due diligence.

1.

PROCEDURAL NOTE: The California Code of Regulations, Title 14 Division 5.5, Section 13105 states that the grounds for the revocation of a coastal development permit (or permit amendment) are as follows:

Grounds for revocation of a permit shall be:

- a) Intentional inclusion of inaccurate, erroneous or incomplete information in connection with a coastal development permit application, where the Commission finds that accurate and complete information would have caused the Commission to require additional or different conditions on a permit or deny an application;
- b) Failure to comply with the notice provisions of Section 13054, where the views of the person(s) not notified were not otherwise made known to the Commission and could have caused the Commission to require additional or different conditions on a permit or deny an application. 14 Cal. Code of Regulations Section 13105.

REQUESTOR'S CONTENTION:

The request for revocation contends that grounds for revocation in Section 13105(a) exist because the applicant submitted inaccurate, erroneous or incomplete information to the Commission in the coastal development permit (permit amendment) application. The contentions raised by the request include the following:

- 1) The applicant submitted inaccurate, erroneous or incomplete information on three issues, and the submittal of accurate information would have led the Commission to deny the project, or to determine that the applicant was not eligible to submit the application.

(a) The first allegation is that inaccurate information regarding the ownership of the property (known as the south/easternmost 60 acres of Area B) was submitted at the time of the request for amendment. The person requesting revocation alleges that in 1990 the State Lands Commission agreed to accept dedication of parcel 1, Area B also known as APN 4211-14-13. In support of this allegation, the requestor asserts that at a public meeting in the February 2001:

"The State Controller revealed that 60 acres of land in Area B had been conveyed to the State Lands Commission years ago. The transfer of land was required in exchange for an option extension developers had been granted related to Area C by Gray Davis when he was Controller."

Therefore, the requestor argues that:

"It appears that the permit applicant did not only fail to reveal the real owners of the land to the Commission but also did not have their permission. Certainly Controller Connell's office has not authorized or been made aware of the environmentally destructive work that Playa Vista Capital intends to do on this land that ought to be restored to its primary historical make-up as a functioning saltmarsh."

- 2) The second issue raised is soil gas; the requestor asserts:

"In the spring of 2001, the State Controller asked the State Lands Commission to undertake an independent study of Methane gas and fault concerns on both Areas C and B where the State owns land."

- 3) The third issue is a request for a moratorium to allow opponents to appeal a ninth circuit decision on lawsuit challenging the Army Corps of Engineers issuance of a 404 permit for the freshwater marsh to the Supreme Court, (United States Central District, Wetland Action Network v United States Army Corps of Engineers June 24, 1998). The person seeking revocation states: "At the time the request was made by the Controller, a federal injunction had halted much of the activity in the Commission's permit area, due to protections of the federally delineated wetlands as ordered by the court. That injunction has now been lifted although our lawyers are preparing a Supreme Court application that would seek another stay. While no injunction is in place it seems important to preserve all options in this sensitive saltmarsh area and to insure that the study by the state is not severely compromised by Playa Vista Capital's digging up a huge detention basin in the location from where much of the gas seepage areas appear to emanate."
- 4) The fourth issue is the possible presence of endangered species. The requestor states: "A final item that needs to be considered by the Commission is that recent field notes uncovered through litigation show that the biologist consultants are aware that the state and federally listed endangered California Least tern forages in this area now, and the allowing this permit to go forward without required Section 7 consultation and biological options being issued about this endangered bird with the proper state and federal authorities may constitute a violation of the Endangered Species Act by the Commission. Given that this is public land, as opposed to private land, as previously thought the Endangered Species Act laws require significantly more thorough review and compliance."

Another federally and state endangered species that has been observed in the southern edge of the freshwater marsh area where a thicket of willows exists along the bluff toe, is the Southwestern Willow Flycatcher. The developer's own records show numerous observations of this bird, which led to their chopping down much of the vegetation in October of 1997. As willows grow quickly, thick willows are again

in abundance in this area and consultation and biological opinions about this endangered songbird is also required.

The request for revocation does not assert that grounds for revocation in Section 13105(b) exist.

STAFF RECOMMENDATION: Staff recommends that the Commission **reject** the request for revocation because the person raising objections has not met the test of section 13105 of the California Code of Regulations.

MOTION: I move that the Commission grant revocation of Coastal Development Permit Amendment No. 5-91-463-A2.

The staff recommends a NO vote on the motion. Failure of this motion will result in denial of the request for revocation and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of Commissioners present.

RESOLUTION TO DENY REVOCATION:

The Commission hereby denies the request for revocation of the Commission's decision on Coastal Development Permit Amendment No. 5-91-463-A2 on the grounds that there is no:

- (a) Intentional inclusion of inaccurate, erroneous or incomplete information in connection with a coastal development permit application, where the Commission finds that accurate and complete information would have caused the Commission to require additional or different conditions on a permit or deny an application.

STAFF NOTE

A revocation of a permit removes a previously granted permit. Even if the permit is vested, i.e. the applicant has undertaken construction of the project, if the Commission revokes the permit, the applicant is required to stop work and if wishing to continue, to reapply for the project. In fact, if the evidence clearly shows that there are grounds for revocation, the Executive Director, upon receipt of a request for revocation, can order the project to stop work. Section 13107 provides, in part: "Where the executive director determines, in accord with Section 13106, that grounds exist for revocation of a permit, the operation of the permit shall be suspended." In this case, the Executive Director has not determined that grounds exist for revocation and the operation of the permit is not suspended.

Because of the impacts on an applicant, the grounds for revocation are necessarily narrow. The rules of revocation do not allow the Commission to have second thoughts on a previously issued permit based on information that comes into existence after the granting

of the permit, no matter how compelling that information might be. Similarly, a violation of the Coastal Act or the terms and conditions of a permit or an allegation that a violation has occurred are not grounds for revocation under the California Code of Regulations. **The grounds for revocation are, of necessity, confined to information in existence at the time of the Commission's action.**

The revocation request is based on subsection (a) of Section 13105 of the Commission's regulations. The three elements of Section 13105(a) that must be proved before a permit can be revoked are:

- 1) That the applicant provided inaccurate or incomplete information
- 2) That any inaccurate or incomplete information was supplied knowingly and intentionally, AND
- 3) That, if the Commission had the accurate and complete information, it would have denied the permit or imposed different conditions.

In addition to these three elements, a person requesting revocation needs to have filed the revocation with due diligence. Section 13108(d) clearly establishes that the Commission must deny a revocation request that has not been filed with due diligence. Clearly it may take some months to prepare a request. In this case, the revocation request notes that its author raised the endangered species issues in a 1998 lawsuit against the United States Army Corps of Engineers. The person requesting revocation also appeared at a 1998 revocation request in which oil and gas issues were raised. However, this request was not filed until 2001. The Commission must determine whether this delay precludes a finding of due diligence.

II. Findings and Declarations

The Commission hereby finds and declares as follows:

A. Project Description and Background

On September 13, 1991, the Commission approved the application of Maguire Thomas Partners for the following development:

- 1) Develop a 26.1-acre freshwater marsh restoration project;
- 2) To have the Coastal Commission accept proposed freshwater marsh restoration and proposed riparian corridor restoration which is outside of the Coastal Zone as a mitigation of wetland fill for future development proposals in other areas of the Ballona wetlands;
- 3) To have the Coastal Commission adopt a recent delineation of wetland habitat in Area A of Ballona wetlands. (Approved with conditions 9/13/91)

In acting on the proposed project, the Commission determined that the freshwater marsh restoration and proposed riparian corridor outside the Coastal Zone could serve as mitigation for future fill of marine wetlands within the Coastal Zone. A half year later, on April 8, 1992, the Commission approved an amendment. This is the action that the requestor seeks to have revoked. The amendment authorized changes in conditions that related to time limits and to monitoring the biological productivity of the marsh after its completion. The conditions principally addressed what would or would not make the freshwater marsh complex suitable for mitigation of wetland fill elsewhere in Ballona wetlands. The project included some berms and a 26.1-acre marsh/riparian system located inside the coastal zone. At the 1992 amendment action, the Commission, at the request of the applicant, changed the standard conditions that controlled the expiration of the permit, ruling that the permit would expire two years after issuance of the permit. The permit was issued in the fall of 1992 and subsequently activated. However, the freshwater wetland has not yet been completed, as a result of a federal court injunction that was issued in litigation challenging the Army Corps of Engineers' approval of a permit for the project. This injunction was recently lifted.

At its hearings on the freshwater marsh, the Commission considered testimony from those who opposed the entire Playa Vista project, and also from those who believed that there should be no separate freshwater marsh and that freshwater runoff should enter the saltmarsh directly. After the Commission acted, other agencies, including the U. S. Army Corps of Engineers (ACOE) and the City of Los Angeles, proceeded with their own approvals of those portions of the project that were within their jurisdictions.¹

B. BASIS FOR REVOCATION REQUEST AND REVOCATION REQUEST'S CONTENTIONS.

1. OWNERSHIP.

The Coastal Act requires that an applicant for a permit must have an interest in the property or permission from the legal owner of the property in order to file a valid application. The person requesting revocation alleges that in April 1992, when Maguire-Thomas Partners - Playa Capital received an amendment that extended the life of its permit, Playa Capital did not own the property and did not have permission from the true owner, the State Lands Commission to apply for the permit. The person requesting revocation cites a public comment on the part of a state officer, the Controller.

On September 28, 1990, U. S. Trust, acting for the State, agreed to grant Maguire Thomas Partners -- Playa Vista an exclusive option to buy Area C (which was held by US Trust for benefit of the state) for an agreed price. In this Agreement, Maguire Thomas Partners—Playa Vista (MTP-PV) agreed to restore and then convey certain wetlands (the "Expanded Wetlands") to the State, or if the State refused to accept the land, to the City. The

“Expanded Wetlands” are the “portion of Area B of Playa Vista which is located east of the recently designated wetlands and south of Jefferson Boulevard”. This includes the site of the freshwater marsh approved in CDP 5-91-463 as amended in 5-91-463A2. The transfer of wetlands depended on certain contingencies, which were laid out in the agreement and modified in a 1994 amendment to the agreement. (Exhibits 12, 13,14)

In a letter to the applicant clarifying the status of the transfer of the Expanded Wetlands, David Vena, the applicant’s counsel explained:

As I believe you are further aware, on September 28, 1990, Playa Capital ‘s predecessor in interest, “MTP-P/V” entered into an agreement with U.S. Trust Company of California (The Area C Trustee”) pursuant to which the MTP-PV was granted an option to purchase Area C and certain other rights with respect to Area C (the “Area C Option Agreement”). Among other considerations for such option, MTP-PV agreed that if it exercised the Area C option, it would in addition to payment of the purchase price for the property deliver to the State title to the Expanded Wetlands Parcel subject to the various covenants, conditions, restrictions and easements which would allow MTP-PV and its licensees to utilize the Expanded Wetlands Parcel for freshwater and salt marsh restoration purposes and the construction of certain Playa Vista related infrastructure improvements. On February 15, 1994, the Area C Trustee and MTP-PV entered into a First Amendment to Agreement amending the Area C Option Agreement to provide, among other things that the expanded wetland parcel would be conveyed to the State regardless of whether MTP-PV purchased any portion of Area C, provided, however that such conveyance need not be completed until February 15, 2004.

On December 29, 1994, the Area C Option Agreement was further amended in various respects, but without altering the arrangements regarding the Expanded Wetlands Parcel.

Lastly, in contemplation of conveying the Freshwater Marsh Parcel to the State, in 1998, Playa Capital as successor in interest to the MTP-PV negotiated a form of grant deed with the State Lands Commission (the “Form of Deed”). The Form of Deed contains specific reservations for the benefit of Playa Capital allowing it to construct and maintain the freshwater marsh upon the Freshwater Marsh Parcel in accordance with the permits it holds for the construction of such marsh from the U.S. Army Corps of Engineers, the California Coastal Commission and the City of Los Angeles. (See paragraph D of the enclosed Form of Deed.) In December 1998, the State Lands Commission voted to accept conveyance of title to the Freshwater Marsh Parcel pursuant to the Form of Deed. Although so approved, the property has not yet been conveyed to the State Lands Commission pending completion of construction of the freshwater marsh, at which time such conveyance will take place.

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In summary, the Freshwater Marsh Parcel is owned by Playa Capital and will be retained by Playa Capital until the earlier to occur of construction of the freshwater marsh or February 15, 2004, at which time it will be conveyed to the State Lands Commission ... (Exhibits 8,12,13,14)

In 1998, the State Lands Commission (in approving the Form of Deed) agreed to accept the land in question after the restoration work is complete. The actual transfer of this land has not yet taken place because the wetland restoration work is not complete (Lance Kiley, Staff Counsel, State Lands Commission, personal communication). The land in Area B continues to be owned by Playa Capital. (Exhibits 12,13,14,18)

The Commission also finds that the parties requesting revocation have not provided a deed or other documentation indicating that the State currently owns Area B or owned it in 1992. The Commission finds that the applicant provided evidence of legal interest in the property at the time of the approval and amendment of the permit and that there is no evidence that the applicant provided incorrect or incomplete information with regard to ownership. There are no grounds for revocation based on ownership issues. The applicant owned the land in fee in April 1992 when the Coastal Commission granted an amendment to the permit. (Exhibits)

2. CURRENT METHANE STUDY.

The person requesting revocation alleges that another ground for revocation is a changed circumstance: "the Controller has asked the State Lands Commission, which she currently chairs, to undertake an independent study of methane gas and fault concerns on both Areas B and C where the State owns land." As noted above, the State does not yet own land in Area B where this freshwater marsh is proposed. Secondly, a new or changed circumstance, in this case, a study proposed in 2000, is not grounds for revocation of a permit granted in 1992. Methane gas explosions are a concern in enclosed structures. In an open marsh area, gas will not accumulate. Therefore, creation of a freshwater marsh will not create hazards from methane gas.

A ground for revocation is inaccurate or incomplete information knowingly provided at the time of the Commission's approval. Information that is discovered after the decision is not grounds for revocation. In April 1992 the Controller had not requested this study. There was no methane study underway in the area until mid-1998. Newly discovered information cannot be considered in analyzing a revocation request, which can address only information that was known by the applicant at the time the permit was considered by the Commission. Therefore, the Commission finds that the applicant did not intentionally provide inaccurate or incomplete information in 1992. Furthermore, even if the applicant had intentionally provided inaccurate or incomplete information regarding methane gas and fault concerns, there is no evidence that the Commission would have reached a different decision.

3. REQUEST FOR A MORATORIUM TO ALLOW AN APPEAL OF A FEDERAL LAWSUIT.

The person requesting revocation alleges that another ground for revocation is a changed circumstance – a federal injunction on the development was lifted in March 2001. The person suggests that the Commission should consider revoking the permit to prevent further work on the freshwater marsh while opponents appeal a decision on the United States Army Corps of Engineers 404 permit for the freshwater marsh to the Supreme Court. The person requesting revocation indicates that the injunction associated with the lawsuit challenging the 404 permit would have enabled the methane study to be completed without the disturbance resulting from the excavation necessary to create the marsh basin. The person argues that “it seems important to preserve all options in this sensitive saltmarsh area and to insure that the study by the State is not severely compromised by Playa Vista Capital digging up a huge detention basin in the location from where much of the gas seepage areas appear to emanate.”

The Commission must base any revocation on inaccurate or incomplete information knowingly provided at the time of its decision. A revocation may only be granted if the criteria for granting a revocation are met. It can not be granted as a way to reconsider a permit decision. The lifting of the federal injunction nine years later could not have resulted in false information being provided when the Commission considered the project in 1992. As explained above, the methane study that was not requested until 2000 cannot be considered information that should have been provided to the Commission in 1992.

4. THE ENDANGERED SPECIES ACT.

The person requesting revocation alleges that another ground for revocation is non-conformity with the Endangered Species Act. The requestor alleges two things: first that “the biologists’ consultants are aware that the state and federally listed endangered California least tern forages in this area now and allowing this permit to go forward without the required Section 7 consultation and biological opinions being issued about this endangered bird may constitute a violation of the endangered species act by the Commission. “ Secondly, the requestor alleges, “Another federally and state endangered species that has been observed in the southern edge of the freshwater marsh area where a thicket of willows exists along the bluff toe, is the Southwestern Willow Flycatcher. The developer’s own records show numerous observations of this bird, which led to their chopping down much of the vegetation in October of 1997. As willows grow quickly, thick willows are again in abundance in this area and consultation and biological opinions about this endangered songbird is also required. Biologists’ notes revealed in a federal Endangered Species Act lawsuit reveal that the developer’s biologists were aware of the presence of a “Southwestern willow flycatcher, an endangered bird.”

The issue here is (1) whether inaccurate or incomplete information regarding the presence of endangered species on the site was provided to the Commission in 1992, and (2) whether in March and April, 1992, the applicant or its consultant were aware that the information regarding endangered species that was provided to the Commission was inaccurate or incomplete. If it is determined that there was inaccurate or incomplete information that was intentionally provided in 1992, the Commission must determine whether the Commission would have made a different decision if complete information was available.

A. Least tern:

- (1) **Inaccurate or incomplete Information.** In 1970, Ballona Lagoon, a mile west-northwest of this site, was identified as critical habitat for the endangered California Least tern. During the seventies, Least terns nested on Ballona Wetland in the salt pans in Area B. These salt pans are not located in the area subject to the development, but are located north of Jefferson. When the Commission certified the LUP in 1984, the salt pan nesting area no longer existed. The terns had moved to a nesting site on the beach at Marina del Rey and to the port. In 1984, in approving the LUP, the Commission reviewed extensive material about local birds, including Least Terns. The existence of least terns in the area was reflected in information available to the Commission in an appendix to the LUP, "Biota of the Ballona Wetlands" prepared by the Los Angeles County Museum Foundation. These documents describe the California Least Terns as birds that feed in open water and nest on beaches and do not suggest that willow thickets or agricultural fields are habitat for the terns, who dive into shallow water and scoop up small fish. These bird surveys available to the staff did not show any terns in the willow thicket or on the mixed agricultural wetland areas of the Area B. Instead, it identified Least Terns on beaches and salt pans.
- (2) There is no evidence that the "agricultural fields" on the project site were habitat for the least tern in 1992. However, there was extensive debate at the time of the LUP hearing on whether the southeast corner of Area B was a salt marsh or an agricultural field, with a patch of wetland.
- (3) The California Department of Fish and Game and the United States Fish and Wildlife Service also were notified of both the LUP and the Commission's consideration of the freshwater marsh permit application and amendment application. The resource agencies communicated with the staff in writing concerning the extent and location of wetlands, and appropriate uses on wetlands and other habitat areas. In reviewing the freshwater marsh, Fish and Game was most concerned that the quality of the water entering the marsh be high enough that the facility would be more than a "detention facility". They did not state that the project might impact the California least tern.

- (4) The Corps analyzed this issue in 1998 in response to an Endangered Species lawsuit. In 1998, in a letter to the Fish and Wildlife Service, addressing the impact of the freshwater marsh on endangered species, Richard Schubel, Chief Regulatory Branch of the United States Army Corps of Engineers, stated

"Historically California least terns were known to nest within the saltmarsh on Playa Capital's property. However, the last known nesting occurred in 1981. There was an observation of a California least tern flying over the Centinela creek in June 1995 as reported by Kathleen Keane. The Corps discussed the 1995 sighting with Ms. Keane and concluded that her observation of the California least tern is insufficient to support a "may affect" determination. ... Centinela creek ..does not provide suitable foraging or nesting habitat for the terns. Flow is ephemeral ((June 11, 1998)

- (5) In 1998, the Fish and Wildlife Service responded to the Corps, concurring that the freshwater MARSH project would have no effect on listed species other than the Southwestern willow flycatcher.
- (6) Conclusion. There is no evidence that any least terns were sighted on the freshwater marsh project site on or before the Commission's approval in 1991, or its amendment in 1992. The tern sighted was sighted in 1995, after the Commission acted. When the Corps investigated that sighting, it failed to confirm that the area of the freshwater marsh should be considered tern habitat. There is no evidence of inaccurate or incomplete information provided to the Commission at the time of its decision, or at the time of the amendment concerning the California Least tern. In addition, assuming for the purpose of this analysis, inaccurate or incomplete information regarding the presence of Least terns was provided, there is no evidence that the applicant intentionally provided inaccurate or incomplete information.

At the time of its action on the amendment, the Commission had extensive files on the habitat of the area. There is no evidence that the wetland restoration contemplated in this permit will adversely impact the Least terns. The Least terns feed in open water. There is no open water in this area. Secondly, the Least tern nests on beaches and salt pans. There are no beaches or salt pans on this part of the site. Therefore, even assuming for the purpose of this analysis, that the applicant intentionally provided inaccurate or incomplete information regarding the presence of least terns, there is no evidence that the Commission would have imposed different conditions or denied the application.

B. The Southwestern willow flycatcher. The allegations are that the presence of the bird was known in 1992 and the information was withheld. The person requesting revocation states had the Commission reviewed accurate or complete information relating to the Southwestern willow flycatcher, the Commission would have made a different decision regarding removal and replacement of willows for the freshwater marsh project.

- 1) The Southwestern willow flycatcher was listed as an endangered bird on February 27, 1995, three and a half years after the Commission made its initial decision and over two years after the approval of the amendment. Therefore, the Commission's findings that there were no endangered birds present in the area subject to construction were accurate at the time. The Southwestern willow flycatcher was listed as a candidate species in 1989. It is found in the southwest on patches of willow and tamarisk separated by "vast stretches of arid lands." California had listed a "willow fly catcher" as endangered in 1991. This is a similar bird, but is not the same species. The USFWS lists loss of riparian lands as a key reason for loss of population. It notes that "federally approved projects that involve ...pond construction or stream channelization when such activity is conducted in accordance with reasonable and prudent measures resulting from a section 7 consultation (should not result in take) ...however the USFWS notice that impoundment and storm water detention basins built without such guidance can harm the species."
- 2) The 1986 LUP showed the area in which the freshwater marsh is located as agricultural and wetland, which was designated to be filled and developed with commercial and residential structures. Background documents reviewed by the Commission in certifying the LUP (the "Biota Report: *op. cit.*) indicated that "willow flycatchers and songbirds" were seen but did not nest in the various willow thickets on the property. The bird surveys did not specifically identify in which willow thickets these birds were seen, and which subspecies were seen. The vegetation reports (Henrickson) specifically identified part of the area impacted by the freshwater marsh as willow wetland.
- 3) In 1991, the Commission reviewed the subject proposal to develop the area as a willow thicket and wetland, served by from the development. The Commission approved the proposal 5-91-463. The proposal did not identify these willows specifically as habitat for flycatchers. Instead, it indicated that the area on which willows would be found would substantially increase to 5.5 acres of "willow scrub wetland" and 3.7 acres of "mixed riparian" wetland. The report indicated that once the area was established, flycatchers were among the species that would be expected to appear.
- 4) A 1998 Fish and Wildlife letter in response to the ACOE letter indicated that based on a 1995 and 1997 sighting, more mitigation for impacts to willows in this area may be needed. It stated "although the 1995 sighting appeared to occur outside the permit area ... there was a more recent sighting in September 1997 by Brian Leatherman, in the degraded willow stand located in the southern part of the footprint of the freshwater marsh. He confirmed that (contrary to his declaration and portions of his October 1997 report) he could not verify that he had observed the federally listed Southwestern willow flycatcher. However, he also states that the

listed and unlisted subspecies of willow flycatcher are virtually indistinguishable in the field during the migration season. Moreover, he felt that was good evidence that the listed subspecies do migrate through the greater Los Angeles area. Therefore, we have determined that the Southwestern willow flycatcher might have used and could possibly in the future use the degraded riparian habitats authorized to be filled by the Corps permit during migration. The sighting of a single flycatcher indicates that the individual was almost certainly a transient and not part of a nesting pair. The permitted project area lacks suitable nesting habitat for the southwestern willow flycatcher. The Service concurs with the Corps determination that the activities permitted by the permit number 90-246 are not likely to adversely affect this listed species. We concur that no further Section 7 consultation is required by the Service.

- 5) The Commission at the time of its action heard opposition to the design, and did have information showing that the willow area was sensitive. This area was identified in biology reports on which the Commission relied in certifying the LUP as "agricultural areas" and as supporting some marsh areas typified by willows (Henrickson, "Vegetation" in "Biota" op cit). The Commission's information indicated that migratory songbirds were found in the willows, but did not nest there. The statistics in the permit for existing habitat merely states that there were 6.5 acres of "state wetland" and does not distinguish between the riparian area and the field. The field supported some saltmarsh vegetation. It was generally described as "agricultural" by the original developer and "degraded wetland" by biologists. In the summer, it typically dried out; in the winter, there were ponds of shallow water that were used as loafing areas by migratory gulls. Most opposition to the project, (Zedler, Henrickson), was aimed at protecting the degraded salt marsh that existed on the field and opposed separating this area from the remainder of the saltmarsh. The opposition letters did not analyze the bird use of the willow scrub.

In summary, the Commission finds that: 1) There is no evidence that the applicant intentionally provided inaccurate or incomplete information about California least terns; 2) the Commission had in its record that there were willows in the footprint of the area impacted by the freshwater marsh; 3) the Southwestern willow flycatcher, cited by the person requesting revocation, was not listed as endangered in 1992; and 4) The person requesting revocation has not provided evidence that this bird was identified on this site prior to April 1992 by the developer and its biologists, or that inaccurate or incomplete information regarding the presence of this bird was provided to the Commission.

The person requesting revocation has not demonstrated that the applicant intentionally provided inaccurate or incomplete information where the accurate and complete information would have resulted in a different decision on the part of the Commission. The Fish and Wildlife service determined in 1998 that the project would not adversely affect the Southwestern willow flycatcher. In fact, the project will increase the amount of willow

habitat appropriate for the species. Therefore, even assuming for the purposes of analysis that the applicant intentionally provided inaccurate or incomplete information about the species, there is no evidence that the commission would have denied the project or imposed different conditions.

C. DUE DILIGENCE

In addition to these three elements, a person requesting revocation needs to have filed the revocation with due diligence. Section 13108(d) establishes that the Commission must deny a revocation request that has not been filed with due diligence. This request was not filed until 2001. Clearly, it may take some months to prepare a request. In this case, the revocation request notes that its author raised the endangered species issues in a 1998 lawsuit against the United States Army Corps of Engineers. The biologists sighted the endangered birds in 1995 and 1997. A 1998 revocation request, which the Commission rejected, raised methane and oil and gas issues. Methane was detected in adjoining area D in 1998. The agreement to transfer the expanded wetlands property to State Lands was made in 1990. However, the person requesting revocation states that this information was unknown to opponents and is in their possession due to the lawsuits that they brought. They state that they could not have brought this request to the Commission's attention earlier. The Commission must determine whether this delay precludes a finding of due diligence.

D. Conclusion

For the reasons set forth above, the Commission finds that the grounds for revocation contained in Section 13105(a) are not satisfied, and as mentioned, the request for revocation does not assert that grounds for revocation of the subject permit exist in Section 13105(b). Therefore, the Commission finds that the revocation request should be denied.

APPENDIX A
SUBSTANTIVE FILE DOCUMENTS:

A: Original Action

1. Certified Marina del Rey/Ballona Land Use Plan, County of Los Angeles, 1984, December 1986.
2. Certified Playa Vista Land Use Plan, City of Los Angeles, December, 1986
3. Agreement for Settlement of Litigation in the 1984 case of Friends of Ballona Wetlands, et.al.v. The California Coastal Commission, et. al., case No. c525-826.
4. Letter to the California Coastal Commission on behalf of the Ballona Wetlands Committee requesting a New Wetlands Delineation in Areas A and C at Playa Vista; Report to the California Coastal Commission on the need for a new delineation of wetlands in Areas A and C at the Ballona LUP, prepared for the Ballona Wetlands Committee by William Want, esq. June, 1991.
5. Extent of Wetlands Jurisdiction under the California Coastal Act, Area A, Playa Vista; Wetlands Research Associates (Dr. Michael Josselyn), June 1991.
6. Biological value of Ballona Freshwater Wetlands System, The Chambers Group (Dr. Noel Davis), June, 1991.
7. Consistency of the Freshwater Wetland System with the Coastal Act.
8. Consistency of the Freshwater Wetland System with the certified Ballona Land Use Plan.
9. Letter of April 11, 1991, from the City of Los Angeles Department of Planning to the California Coastal Commission advising the Commission of the Department's Approval in Concept of the Freshwater Wetland System.
10. Collected Public Comments on the US Army Corps of Engineers Public Notice on the Freshwater Wetland System (Public Notice/Application No. 90-426-EV), including comments from the California Department of Fish and Game, (February 5, 1991 CDFG letter) and the U.S. Fish and Wildlife Service.
11. MTP-PV's Response to Comments, Application to the Corps of Engineers for a permit pursuant to Section 404 of the Clean Water Act for Freshwater Wetlands and Development at Playa Vista, June 1991. Includes response to the comments of CDFG (21-23) and USFWS (pp.12-19).
12. Water Demand: Proposed Ballona Freshwater Wetland System; Sharon Lockhart, et al., June, 1991.
13. Water Balance for the Proposed Freshwater Wetland System, Playa Vista, Camp Dresser and McKee, Inc., June, 1991.
14. Environmental Checklist Form, based on Appendix I from CEQA: the California Environmental Quality Act, Statutes and Guidelines, 1986.
15. Alternatives and Mitigation Analysis for the Coastal Development Permit Application to Develop A Freshwater Marsh in Area B of the Ballona Planning Area.
16. Wetland Acreages in the Playa Vista Project Area and the Freshwater Marsh Area.

B. Referenced in this analysis but not available at the time of the Commission's original action.

1. James Bartel, United States Fish and Wildlife Service, Letter June 19, 1998 to Richard J Schubel, Chief, Regulatory Branch, Corps of Engineers, Los Angeles District. "Playa Vista Phase I Permit (90-426-EV) Endangered Species Act Section 7 considerations"
2. Wetlands Action Network, Ballona Wetlands Land Trust and California Public Interest Research Group v. the United States Army Corps of Engineers.
3. Judge Lew, Federal District Court, June 1996, decision in Wetlands Action Network et al v United States Army Corps of Engineers.
4. Agreement Among U.S. Trust Company of California N. A, Maguire Thomas Partners – Playa Vista Area C, a California limited partnership, and Maguire Thomas Partners-Playa vista, a California limited partnership, September 28, 1990.
5. First Amendment to Agreement among U.S. Trust Company of California N. A, Maguire Thomas Partners – Playa Vista Area C a California limited partnership, and Maguire Thomas Partners-Playa Vista, a California limited partnership, effective May 15, 1994.
6. Second Amendment to Agreement among U.S. Trust Company of California N. A, Maguire Thomas Partners – Playa Vista Area C a California limited partnership, and Maguire Thomas Partners-Playa Vista, a California limited partnership, entered into December 29, 1994.
7. City of Los Angeles City Engineer, Memorandum Public Works review of ETI report titled "Subsurface Geo-chemical Assessment of Methane Gas Occurrences" for the Playa Vista project; file 1996-092; May 10, 2000
8. Victor T. Jones, Rufus J. LeBlanc, Jr., and Patrick N. Agostino, Exploration Technologies, Inc, Subsurface Geotechnical Assessment of Methane Gas Occurrences. Playa Vista First Phase Project. April 17, 2000. [Also referred to as the Jones Report or "the ETI report."]
9. Camp Dresser and McKee 2000, "Soil gas sampling and analysis for portions of Playa Vista Areas A and C near Culver Boulevard Widening Project" 4 page geologic letter report to Maria P Hoye dated 27 November, 2000 and signed by A. J. Skidmore and M. Zych (RG).
10. Mark Johnsson, Senior Geologist, California Coastal Commission, Memorandum: "Culver Boulevard Widening Project and Potential Soil Methane Hazards"
11. City of Los Angeles Department of Building and Safety, Memorandum of General distribution, #92, Methane Potential Hazard Zones, March 19, 1991.
12. City of Los Angeles, Office of the Chief Legislative Analyst, City Investigation of Potential Issues of Concern for Community Facilities District No 4, Playa Vista Development Project, March, 2001.
13. California Department of Fish and Game, Memorandum: Extent of Wetlands in Playa Vista, December 1991."